International Brotherhood of Teamsters, Local 25 *and* Denise Avallon. Case 01–CB–010882

March 1, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On June 7, 2010, Administrative Law Judge Mark D. Rubin issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief and a brief in support of the judge's decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

[1] The Acting General Counsel also filed limited exceptions and a supporting brief, requesting that interest on the backpay award in this case be compounded on a quarterly basis. These exceptions are moot in light of the Board's issuance of *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). See fn. 4 below. There were no exceptions to allegations dismissed by the judge.

[2] In his summary of the testimony of Transportation Coordinator Kevin Kelleher, the judge found that Pat Friel was among those whom Kelleher had referred for employment, although Friel did not appear on the casual referral list that Kelleher used. In response to the Respondent's exceptions, we find that, in fact, Friel's name appeared as 105 on that list. This inadvertent error does not affect our finding of violations by the Respondent.

[3] We agree with the judge that the Respondent violated Sec. 8(b)(1)(A) and (2) by refusing to refer Charging Party Denise Avallon from its casual referral list for work with employers contracting with the Respondent for drivers. Consistent with the analytical framework set forth in *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170 (2006), enfd. 315 Fed.Appx. 318 (2d Cir. 2009), and cases cited there, the Acting General Counsel established a presumptive violation by showing that the Respondent failed to refer Avallon, a qualified, eligible driver-candidate. The Respondent did not rebut this presumption. Specifically, the Respondent failed to substantiate the performance problems it claimed existed with Avallon's previous referral work. Absent such proof, we find that the Respondent did not establish that refusing to refer Avallon for driving jobs was necessary to the effective performance of its function of representing its constituency.

We do not rely on *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 352 NLRB 29 (2008), a two-Member decision cited in the remedy section of the judge's decision. See *New Process Steel, LP v. NLRB*, 130 S.Ct 2635 (2010). We do, however, rely on the cases cited in *AVW Audio Visual*, above at 32, in support of the judge's remedial discussion in the present case.

[4] In accordance with our decision in *Kentucky River Medical Center*, above, we modify the judge's remedy by requiring that backpay and any other monetary awards shall be paid with interest compounded on a daily basis.

We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

We shall otherwise modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found. We shall also substitute a new notice that reflects those changes.

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Teamsters, Local 25, Charlestown, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Operating an exclusive hiring hall without using objective criteria in referring applicants for employment.

(b) Departing from its written rules governing the referral of applicants.

(c) Failing to keep adequate records of its referral system.

(d) Failing and refusing to refer applicants for employment for arbitrary, invidious, or capricious reasons.

(e) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Operate its exclusive hiring hall by using objective criteria when making referrals.

(b) Maintain records of the operation of its referral system sufficient to establish that the referral system is being operated in accordance with the Respondent's written rules.

(c) Make Denise Avallon whole for any loss of earnings and other benefits suffered as a result of its unlawful failure and refusal to refer her for employment, in the manner set forth in the remedy section of the judge's decision, as modified above.

(d) Consider Denise Avallon for employment referrals based on objective criteria and standards, and in accordance with its written rules.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Charlestown, Massachusetts office, hiring hall, or other relevant facility, copies of the attached notice

marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has ceased operating the hiring hall involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former members whose names appeared on the Respondent's hiring hall registry at any time since January 2008.

(g) Within 14 days after service by the Region, deliver to the Regional Director for Region 1 signed copies of the notice in sufficient number for posting by the Parties to Contract, if willing, in all places where notices to employees are customarily posted at their facilities within the area served by the Respondent.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT operate our exclusive hiring hall without using objective criteria in referring applicants for employment.

WE WILL NOT depart from our written rules governing the referral of applicants.

WE WILL NOT fail to keep adequate records of our referral system.

WE WILL NOT fail and refuse to refer you for employment for arbitrary, invidious, or capricious reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL operate our exclusive hiring hall by using objective criteria when making referrals.

WE WILL maintain records of the operation of our referral system sufficient to establish that the referral system is being operated in accordance with our written rules.

WE WILL make Denise Avallon whole for any loss of earnings and other benefits suffered as a result of our unlawful failure and refusal to refer her for employment, with interest.

WE WILL consider Denise Avallon for employment referrals based on objective criteria and standards, and in accordance with our written rules.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 25

Joe Griffin, Esq. and *Karen E. Hickey, Esq.*, for the General Counsel.

Michael A. Feinberg, Esq. and *Renee J. Bushey, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. This case was tried in Boston, Massachusetts, on January 26, 27, and 28, 2010, based on a charge and an amended charge filed by Denise Avallon (Charging Party or Avallon) on April 29, 2008 (original), and March 9, 2009 (amended), against International Brotherhood of Teamsters, Local 25 (Union or Respondent).

The Regional Director's complaint and notice of hearing, dated July 31, 2009, alleges that in the course of operating an exclusive hiring hall, the Union violated Section 8(b)(1)(A) of the Act by making referrals of employees to employers without regard to published rules governing the referral process, dated December 17, 2007, and without maintaining or making available to employees records regarding the operations of its referral system. More specifically in this regard, the complaint alleges that the Union failed to consistently inform its members of unwritten criteria used by it for referrals, failed to refer individ-

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

uals from the Union's casual referral list unless they were known to the Union's transportation coordinators, failed to maintain records of the operation of the referral system, failed to uniformly "limit the work of casual drivers known to, and liked by, its transportation coordinators," and failed and refused to refer the Charging Party for employment.[1]

The Respondent denies that it violated the Act as alleged in the complaint. More specifically, the Respondent asserts that it followed its referral rules, that the rules were reasonably calculated to allow it to efficiently operate its hiring hall, and that the failure of the Charging Party to be referred to a job was a result either of the normal nondiscriminatory operation of the hiring hall or because of Avallon's asserted poor performance and work-related incidents when she had been referred to work in earlier years.

At the trial, the parties were afforded a full opportunity to examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file posttrial briefs. Based on the entire record, including my observation of witness demeanor, and after considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint pled, and the answer admits, that each of the Parties to Contract are corporations engaged in the production of motion pictures, and that each, in the conduct of said business operations, purchased and received goods or purchased services within the 12-month period ending December 31, 2008, valued in excess of $50,000, at locations within the Commonwealth of Massachusetts, directly from points outside the Commonwealth of Massachusetts. I find, and the Respondent admits in its answer, that the Parties to Contract, at all material times, have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

I find, and the answer admits, that the Respondent, International Brotherhood of Teamsters, Local 25, has been at all material times herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

Overview of the Union's Referral Rules and Procedures

The complaint allegations arise from the Union's operation of an exclusive hiring hall in respect to providing drivers for various entities engaged in producing motion pictures, television shows, and commercials within the jurisdiction of the Union, including all of New England, except Connecticut and Rhode Island. The Union, by its president, Sean O'Brien (O'Brien), and its secretary-treasurer, Mark Harrington, negotiates collective-bargaining agreements with various production companies, including the Parties to Contract,[2] generally covering a particular production.

The Union's rules controlling the referral procedure (referral rules) are dated December 16, 2007, and provide for both a regular employee list (seniority list) and a casual employee list (casual list). Seniority list drivers are listed in order of seniority, while casual drivers are listed in the order in which they were placed on the list, although it is not required that they be referred in that order.[3] As discussed infra, drivers are chosen from the casual list only after the seniority list has been exhausted.

The referral rules set forth the following requirements for inclusion on either list: "1. Submit an accurate resume for distribution by Local 25 to potential employers. Such resume must contain the applicant's name, current residence address, telephone/pager numbers, job history, criminal history, if any, authorization for CORI checks and current certification and licenses; 2. Pay Local 25's dues or service fee each month; 3. Agree, in writing, to abide by the Teamsters Local 25 referral rules as they may be amended from time to time; 4. Not be employed by an employer on a full-time and regular basis."

The referral rules state that the seniority list "shall consist of all eligible and qualified individuals who have a demonstrable record of relying on employment [in] the motion picture and television production industries," and mandate the following additional qualifications for inclusion on the seniority list: "1. Possess a current commercial driver's license (CDL); 2. Are available for referral to employment in the industry; 3. Have a current DOT medical certificate, and have passed a recent drug screen." The rules further provide that the casual list drivers shall consist of all other eligible and qualified individuals who meet the same requirements.[4] Harrington oversees the administration of the driver resumes and driver information on the casual list and the Union does not deny anyone the right to be placed on the casual list, nor screen applicants.[5]

The referral procedure is initiated by the Union's negotiation of a collective-bargaining agreement containing an exclusive hiring hall provision with a production company intending to film a production in the Union's geographic area of jurisdiction. After the contract is executed, either O'Brien or Harrington appoints a transportation coordinator (TC) to handle the hire/referral of drivers to the production and assignment of the drivers to specific vehicles.[6] The TCs decide which drivers to

[1] During the course of the hearing, counsel for the General Counsel stipulated that the General Counsel did not assert or maintain that any of the Union's actions alleged in the complaint were caused by, or related to, any hostility the Union may have maintained against members of Avallon's family and more specifically, against Avallon's stepfather, Jimmy Flynn, formerly an official of the Union.

[2] The Parties to Contract alleged in the complaint are: New Line Productions/Avery Pix, Inc. (New Line); Surrogates Productions, Inc. (Disney); Proposal Productions, Inc. (Disney); Columbia TriStar-Sony (Columbia); Utopia Planitia Productions (Utopia); Fox2000/Fox Entertainment Group (Fox); Edge of Darkness LLC (Edge); Donny McKay LLC (Donny); MFX USA LLC (MFX); Atlantic Film Production (Atlantic); and Summit Entertainment (Summit).

[3] Until the most recent list, which is alphabetized.

[4] O'Brien, however, testified that, in fact, the Union did not require possession of a CDL for inclusion on the casual list.

[5] Credited testimony of Harrington.

[6] The rules explicitly grant to the production company (employer) the ultimate right to interview and select for employment drivers from

call from the lists, utilizing the seniority list first and then the casual list, if the seniority list has been exhausted. According to Harrington, the Union tries to have TCs keep records on which drivers they call or don't call on the casual list, but does not mandate that they do such. He testified, "We try. Some guys are more proficient with computers, so . . . we encourage them to do that . . . they have to have some discretion and I can't oversee all that."

Article V of the Union's referral rules, the "Referral Procedures" "For Casual Employees," vests ultimate authority in the employer to decide which drivers to select from the Union's casual list, as follows: "The employer has the ultimate authority to decide who to hire from the list and Local 25 does not have any right to insist that the employer hire any particular individual." Yet, the testimony of various Union TCs, detailed below, establishes that on virtually all occasions, the union-appointed TCs make the effective decision as to which individuals will be called to work from the Union's casual list. Article V also mandates that the Union "shall maintain written records concerning all aspects of its referral service."

While the TCs choose drivers from the casual list, both Harrington and O'Brien sometimes have input on their selections. Thus, Harrington testified that TCs sometimes consult with him when looking for casual list drivers qualified to drive specialized equipment. And O'Brien testified as to two occasions in which he assisted drivers in gaining employment on a movie production. On one occasion, he called a TC to secure employment for an out-of-work union member with no health insurance and a severe medical condition. On another occasion, he called TC O'Brien, Sr., as to a union member who had been fired during an organizing drive, which call resulted in the driver being hired on a production.

Denise Avallon

The Charging Party, Denise Avallon, is a member of the Union, and has been since 1992. As such, she was employed by United Parcel Service until 1997. She was first employed in the movie industry in 1997 as a production assistant on the movie, "In Dreams."[7] Eventually, her stepfather, Jimmy Flynn, a TC for the Union on the movie, referred her to a driver's job on the movie, and she was hired. Avallon then worked, by referral, as a driver on a number of movies until 2003. She drove a van while working on various movies, and she possessed a non-CDL driver's license.

Sometime in 2003, Avallon took a job outside the movie industry at a university in Rhode Island. Avallon testified that at the time she believed she was removed from the Union's seniority list because she failed in her attempts to obtain a commercial driver's license (CDL).

On February 6, 2008, Avallon spoke to Harrington by telephone about her interest in returning to work driving in the movie industry.[8] During the call, Harrington told Avallon that she did not need to possess a CDL to work in the movies.[9] Subsequently, about March 6, Avallon filed a grievance or appeal to the Union, asserting that she had provided the Union with her resume, as requested by Harrington, but that the Union has "refused me work by not putting my name on the regular [seniority] employee list or the casual list."

By letter dated 3 days later, O'Brien informed Avallon that the Union was in receipt of her March 6 grievance, and of her resume, and had placed her on the casual list at number 145. O'Brien also informed Avallon in the letter, that her name had been removed from the seniority list on June 24, 2005, "by former Field Representative Lou DiGiampaolo," that the Union had no record of any grievance having been filed as to this action, and that any grievance now filed as to such would be untimely. Thus, she was not being placed on the seniority list.

Avallon filed an appeal, dated March 19, 2008, of the Union's decision keeping her off the seniority list. In her appeal, Avallon asserted that she had no knowledge that she had been removed from the seniority list in June 2005, and that she believed she was removed from the list in August 2003, because she failed to provide the Union with a copy of her CDL, because she had no CDL. She further asserts in the letter that she understood possession of a CDL was no longer necessary for employment in the movie industry and that she should be restored to the seniority list.[10]

In a letter from O'Brien to Avallon dated April 24, 2008, the Union informed her that the Union's Executive Board met on April 18 to consider her appeal of being denied placement on the seniority list. The letter continued, "Your appeal has been denied. However, as stated to you in our letter of 3/11/08, your name has been placed on the Casual Referral List. The decision of the Executive Board is final and binding." Also, in a phone conversation on April 24, Harrington told Avallon that her appeal had been denied by Executive Board, that he didn't choose who works [on the movies], but the TCs, captains, and production companies chose who works, and that he didn't need any van drivers at that time.[11]

On direct examination, counsel for the General Counsel asked O'Brien whether he had asked any of the TCs to refer or hire Avallon for a movie job. O'Brien answered that during April or May, 2008, "I . . . had a conversation with those guys. And . . . obviously one of the reasons we're here is they didn't think she was a good candidate." O'Brien testified that the TCs complained to him about Avallon's prior work performance in movies, including not being close to her van when she was supposed to be, refusing a job assignment involving driving to New York, smoking in her van, and stalking actor Kevin Costner. Harrington testified that the Union never investigated, held a hearing as to, nor informed Avallon of, these allegations.

the seniority list first, and then from the casual list upon the exhaustion of the seniority list.

[7] Avallon's stepfather, Jimmy Flynn, called her and told her there was such a job available. At the time, Flynn was a transportation coordinator for the Union on the production.

[8] Harrington testified she called him, while Avallon testified to the opposite. Who originated the phone call is not germane to the issues here.

[9] As noted above, Harrington testified that possession of a CDL was not mandatory for inclusion on the casual list.

[10] Avallon admitted, during her testimony, that she had failed the CDL examination at least once, and maybe twice.

[11] Credited and undisputed testimony of Avallon.

Further the Union maintained no records of any of these asserted complaints against Avallon or any written complaints about her work performance.[12] Avallon has not been referred by the Union to work in the movie industry, since her February 6, 2008 conversation with Harrington or her placement by the Union on its casual list.

Transportation Coordinator (TC) Witnesses

The bulk of the witnesses at the hearing consisted of certain Union TCs testifying as to how they go about selecting drivers from the seniority and casual lists to work on a particular production. In this regard, Kevin Kelleher, James Donahue, William O'Brien III (O'Brien III), William O'Brien Senior (O'Brien Sr.), and Robert Carnes were called as witnesses by the General Counsel under Section 611(c) of the Federal Rules, and Robert Wright by the Union, and testified as to how they chose drivers from the lists or otherwise.[13] Each of these witnesses appears on the seniority list, and has been appointed by the Union as TC on various productions. Each testified as to how they went about calling drivers for particular productions on which they served as a TC, and all except Kelleher testified as to their reasons for not choosing Avallon to work on a production and past experiences working with her on certain productions or, in some cases, what they had been told by others as to asserted work incidents involving Avallon. Synopses of their respective testimony follow.

Kevin Kelleher

Kelleher has been a union member since about 1994, is included on the seniority list, and was chosen by O'Brien to be the Union's TC for one movie, "Bride Wars," which lasted 2 months beginning in February 2008. The Union also designated Kelleher as the TC for the television production "Wheel of Fortune," in 2009. Kelleher testified that he assumed that nobody on the seniority list would be available for the movie because of the volume of ongoing movie work at the time. He received the casual list from the Union in February, and was told by O'Brien "you just follow the list as it runs down, and you call in that order."

About April 1, 2008, Kelleher faxed a list of the drivers working on "Bride Wars" to the Union, in order "to make sure that everybody was a member in good standing." Even though he was told to call in order down the list, when Kelleher actually began to call drivers from the casual list, he began to call names on the second page rather than the first[14] because "I did not believe that I would be able to start at the top because a lot of these people were working. As I started to call, maybe at the second sheet, every one I called was either working or had been called or scheduled to work. So I basically just kept going until I found someone that was not called."

When asked by counsel for the Union what qualifications he was looking for when calling people from the casual list, Kelleher testified that he would first look for a CDL "A" license. He testified that after license type he would look for experience driving particular types of vehicles used on the production.

In addition to using the four-page casual list, Kelleher referred individuals for work on "Bride Wars" based on Harrington telling him that these individuals were in the union hall looking for work or that they were "oilmen" who were out of work. These drivers included Robert Sacco (no. 144 out of 152 on the casual list), who operated a van on "Bride Wars," John Murphy (no. 24 on the casual list), and Douglas Burks (no. 150 on the casual list). As to Avallon, no. 128[15] on page four of the casual list, Kelleher had no specific recollection of calling her, but believes he did, because he believes he called all the names on page four. Kelleher testified that if he didn't get an answer on his first call to a person on the casual list he immediately moved to the next name. When Kelleher exhausted the list, he spoke to Harrington, who told Kelleher that there were "oilmen," who had been laid off and were available for work.

Kelleher also referred drivers from a list he kept of "day players," who were drivers who made themselves available to be called at the last minute to "fill in."[16] Day players did not have a full-time job elsewhere, but might have other part-time work. Kelleher referred/hired day players Bill Owerka, Jim Bilack, and Mark Cavanaugh for the "Bride Wars" production, none of whom are contained on the casual list. Kelleher also hired/referred other drivers to "Bride Wars," including the following drivers, none of whom appeared on the casual list: Chad White, Pat Friel, and Billy Owerka. Kelleher also referred/hired the following drivers who appear on the casual list: Frederick Donehy, Jr. (no. 132), Tom Goggin (no. 137), and Robert Turner (no. 131). Sacco and White drove vans on Bride Wars, which require non-CDL "D" licenses. White alternated between driving a van, and driving actress Candice Bergen, one of the movie's stars.

James Donahue

Donahue, a member of the Union since the early 1970's, and included on the seniority list at no. 13, was appointed by O'Brien as the TC for the movie production "This Side of the Truth," which lasted from about March 24 through May 14, 2008. He testified that his duties as TC included supplying drivers for the production and assigning drivers to particular vehicles, that he was familiar with the Union's referral rules, and that 99 percent of the time he made the hiring/referral decisions on his own.

Donahue testified that he would call drivers from the seniority list first in order of their numbers on the list, assuming seniority list drivers were available, then go to the casual list. When calling from the casual list, he looks for names that he is familiar with, that he has worked with in the past, and had done

[12] Credited testimony of Harrington.

[13] The complaint pleaded, the answer admitted, and I find that all of these TCs, and O'Brien and Harrington, have been agents of the Respondent within the meaning of Sec. 2(13) of the Act.

[14] He also testified that as he went down the list, if he called somebody who was already working, he assumed that everybody above on the list was also already working. Further, he believed his first call was to no. 103 on the list, Greg Harris. Harris apparently was already working as he did not work on "Bride Wars."

[15] For reasons not explained at trial, Avallon also appeared as no. 145 on p. 4 of the casual list. Kelleher testified that at the time he made the calls from the casual list, he didn't recognize that Avallon appeared twice on the list.

[16] Kelleher's day player list was a personal list kept by him, rather than an official list kept by the Union.

a "good job." He gives preference to drivers with a CDL "A" license, because an A license allows drivers to drive any vehicle on the production from tractor-trailers to vans, whereas a non-CDL "C" or "D" license would restrict drivers to driving vans. Sometimes, Donahue calls other TCs to find out which drivers they are using and, hence, who wouldn't be available for him to call.

Donahue testified that he did not call Avallon when seeking drivers for productions in which he was a TC during 2008 and 2009. He testified that he personally knew her, that he worked with her during 1997 on the movie "In Dreams," on the 1998 movie "Message in a Bottle," and on What's the Worst That Can Happen," and that, based on his opinion of her behavior on those jobs, he did not want to work with her, "ever again."

Specifically, Donahue complained that during "In Dreams" Avallon asked him what he spoke about with the film's director, when driving him. Donahue responded to her that he only spoke to the director if the director spoke to him first, and otherwise just drove. According to Donahue, he advised Avallon to do the same if she was in that position. Donahue also complained that during "In Dreams" Avallon spent time roaming around rather than waiting by her van, and that other people on the set asked him where she was because she was either not at her van or not answering the radio.

Donahue testified that while working with Avallon on "Message in a Bottle" actor Kevin Costner's driver, "Mary," asked Donahue if there was any way he could keep Avallon away from Costner's trailer, and told him that Avallon "was spending a lot of time around the trailer, looking in the windows and making everybody uncomfortable." But Avallon continued to work on the movie.

Finally, Donahue testified that while working with her on "What's the Worst That Can Happen" he was told by TC Robert Wright that while driving a van carrying the production's wardrobe employees Avallon "ducked" her head down while driving under an overpass, and that somebody else in the van had to grab the steering wheel. Donahue testified that he was also told by Wright that on another occasion during the production Avallon drove a costume designer to a store, but failed to pickup the designer, forcing the designer to take a taxi back to the set. Donahue was told about, but witnessed neither of, these asserted incidents.[17]

William O'Brien, III

O'Brien, III, a member of the Union, has been working in the movie industry since 1991, and is no. 6 on the seniority list. O'Brien, III was appointed by O'Brien as the TC for the movie "Mall Cop," in February 2008,[18] and began calling drivers to work on the movie sometime in mid-February. Work on the movie continued until the end of May.

On "Mall Cop," O'Brien, III followed his usual practice of first calling drivers from the seniority list, and then the casual list. O'Brien, III testified that he prefers drivers with CDL "A" or "B" licenses, and then "I look for somebody that I might have worked with before, and if they did a good job." He further explained, "Well somebody that I worked with on a job, and I seen them driving a truck and they did a good job, there was no accidents and they were always on time."

O'Brien III did not retain the casual list he used after the completion of the movie,[19] but that after calling all the drivers contained on the casual list, he still needed more drivers.[20] He contacted the Union and requested the names of drivers with a CDL "A" license, because he needed drivers to drive trailers. Retired union members John Chambers, John Crehan, and Robert Ricciardi worked on the movie, but Crehan and Ricciardi are not included on any of the February casual lists nor do their names appear on the seniority list. O'Brien, III testified that he called Chambers, Crehan, and Ricciardi to work on "Mall Cop," after he called drivers from the casual list.

O'Brien, III was appointed by either Harrington or O'Brien in July 2008, as TC on the movie "Edge of Darkness."[21] O'Brien, III began calling drivers from the seniority list, and then utilized the July 29 casual list, which list he did not retain after completion of the movie. He also called other working TCs to ascertain which drivers were available. O'Brien, III testified that he went through the entire casual list of 257 drivers before calling drivers from other locals,[22] and that 3 drivers from other locals worked on the movie, driving specialized vehicles which were rented from vendors.

O'Brien, III testified that among drivers he hired/referred for "Edge of Darkness" from the casual list, he called Steve Coleman to drive a non-CDL van because he was "familiar with his work" from working together on "Mall Cop," called John McGonigle, who possessed a non-CDL "D" license to drive a van because he was familiar with his "work ethic" from working together on "Mall Cop," called Dan Redmond, who possessed a non-CDL "C" or "D" license to drive a van because he knew him from working together before, and called Chris Johnson because of his knowledge of his "work ethic," from working together on "Mall Cop." About 36 drivers were hired/referred by O'Brien, III to work on "Edge of Darkness."

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[17] Respondent's counsel stipulated that Donahue's testimony as to what he was told by "Mary" and by Wright is offered not for the truth of the matter asserted, but to demonstrate the basis upon which the TC assertedly did not refer Avallon. Based on said stipulation, and for said reason, I admitted said testimony over the General Counsel's hearsay objection. The testimony would be obvious hearsay if offered for the truth of the matter asserted.

[18] O'Brien was elected president of the Union in 2006. O'Brien, III worked continuously as a driver in movies from 1996 to 2008, when O'Brien appointed him as TC for "Mall Cop." O'Brien, III had previously been appointed a TC in 1995.

[19] O'Brien, III remembered that he acquired the casual list from the Union, but didn't remember the date of the list, other than it was in February. The Union published five different casual lists on various dates in February.

[20] O'Brien, III testified that he considers the casual list basically exhausted when all the CDL "A" and "B" drivers are gone.

[21] O'Brien, III appears in the transcript as having testified to "2009." Either he or the transcript is incorrect.

[22] In their brief, counsels for the General Counsel assert that O'Brien, III "exhausted the casual list for drivers with A and B licenses, but not for the non-CDL drivers." In fact, he testified that he exhausted the list for "all drivers."

The Union also named O'Brien, III as TC for the movie "Wichita," which was filmed beginning about the end of August 2009 until the first week of December. O'Brien, III testified that he used the seniority list and then the casual list to hire/refer all the drivers for this movie, that he looked for CDL licenses when choosing drivers, that on a typical production day about 58 drivers were used by the production, and that he didn't keep records of calls he made to drivers to work on the movie.

As to Avallon, O'Brien III testified that he was acquainted with her, had worked as a driver on movies with her, and did not call her to work on movies on which he was a TC since January 2008, based on what he asserted was his personal knowledge of her prior work performance. He testified as to incidents on various movies that Avallon worked on.

O'Brien III testified that in 1997 he worked on the movie "In Dreams" as a driver, that Avallon also worked as a van driver on the movie, that she was called/hired by movie TC Jimmy Flynn, Avallon's stepfather, and that Robert Martini was the Union's captain on the movie. O'Brien, III further testified that during the production, Martini told Avallon that he was assigning her to go to New York the next day for a pickup, that Avallon was upset over the assignment and left, that shortly thereafter Flynn appeared on the set, that O'Brien III then overheard an argument between Flynn and Martini that involved swearing, and that Flynn took Martini's radio from him and told Martini that he, Flynn, was the boss and would assign who goes where. O'Brien III testified that he assumed another driver made the trip to New York because some equipment had to be picked up, and Avallon did not make the trip.

He further testified as to two incidents that occurred in 1998 on the movie "Message in a Bottle," during which he and Avallon worked as drivers, and O'Brien, Sr. was the TC. According to O'Brien III, he observed actor Kevin Costner playing catch with his son at the production's base camp, and saw Avallon walk over to the two of them and stand next to Costner. According to O'Brien III, Costner, thereupon, left the area, and walked back to his trailer with his son. O'Brien III testified that he then observed security guards escorting Avallon away from the area. However, according to O'Brien III, Avallon continued to work on the production.

O'Brien III also testified as to other incidents during the "Message in a Bottle" production. He said he observed, from a distance of about 50–75 feet, Avallon back her assigned van into a pole in a restaurant parking lot, and then move the van to the back of the lot. He also testified that he observed Avallon smoking in her van, a violation of the rules, and burning incense in her van. He said he heard passengers complain about the incense.

He also testified to working with Avallon on the 2002 movie production of "What's the Worst That Can Happen?" According to O'Brien III, a passenger in a van he was driving, told him that while he was a passenger in a van driven by Avallon, and that while driving under a bridge, Avallon ducked down and the passenger had to grab the steering wheel. O'Brien III said that the passenger told him he would never get in a van with Avallon again.[23] Finally, O'Brien, III testified that he doesn't dislike Avallon, but considers her an unsafe driver based on backing her van into a pole in the restaurant parking lot, and riding in a van with her.[24]

William O'Brien, Sr.

O'Brien, Sr. is a member of the Union, has been working in the movie industry since 1963, has been the shop steward of the Union's movie division for about 5 years, and is no. 1 on the Union's seniority list. O'Brien Sr. was appointed by O'Brien as the TC for various movie and television productions in 2008 and 2009.

O'Brien, Sr. testified that when acting as a TC on a production, he, exclusively, picks out the drivers that work on the project[25] and assigns vehicles to them, and that in picking drivers he first utilizes the seniority list, starting at the top of the list and going down,[26] and then goes to the casual list. In choosing from the casual list, O'Brien Sr. testified that he first looks at the driver's class of license, preferring the CDL "A" or "B" classes to the non-CDL "C" or "D" classes, because the drivers with CDL licenses are permitted to drive most vehicles on the production, while the non-CDL licensees are limited to vans. After considering the class of license, O'Brien, Sr. looks to whether he has previously worked with the driver and, thus, is in a position to evaluate how well they perform their work, or whether another TC has informed O'Brien, Sr. about the driver's work on a prior project.[27]

As the TC for the movie production "Ghosts of Girlfriends Past," which lasted from January to May 2008, O'Brien, Sr. first utilized the seniority list to hire/refer drivers, and then the casual list dated February 11, 2008. The Union's "call sheet" for the day of May 6, 2008, one of the days during the movie's production, discloses a total of 29 drivers referred by the Union, working on the production. In answer to counsel for the General Counsel's questions, O'Brien, Sr. testified that he knew the following drivers named on the call sheet from previously working with them on other productions: Steve McQuire, Dan Anderson, William Coyman, and Keith Leahy. O'Brien, Sr. also testified that driver Mario Sanchez, whose

[23] Testimony admitted over the General Counsel's hearsay objection. Said testimony is considered not for the truth of the matter asserted, but as an asserted basis for why O'Brien, Sr. did not refer Avallon.

[24] Counsel for the General Counsel, on cross-examination, challenged O'Brien III's testimony as to riding in a van with Avallon on the movie "In Dreams," or perhaps another movie, asserting that it was not mentioned in his investigatory affidavit. Without having the affidavit to review and being able to analyze the context of the questions asked during the course of the affidavit, I am unable to say that the absence of mention in the affidavit leads to a doubt as to the credibility of O'Brien III's testimony as to riding with Avallon. While O'Brien III's demeanor on the witness stand demonstrated he was unhappy with having to testify in court, he also appeared willing to entertain questions of all counsel, and to answer in a, generally, nonargumentative fashion that gave the appearance of credibility.

[25] O'Brien testified that although the production companies have the right to interview prospective drivers, they never have.

[26] The names on the seniority list are in order of seniority.

[27] In answer to counsel for the Union's question, O'Brien, Sr. testified that it makes no difference to him whether or not he "knows someone."

name appears on call sheet, and who possessed an "A" license, did not appear on either the seniority list or the casual list and, hence, he obtained his name from the "Union hall."

Following "Ghosts of Girlfriends Past," O'Brien, Sr. was appointed in May 2008, as TC for the movie production "Surrogates," which lasted until about late August or early September. As "Surrogates" had already begun production when O'Brien Sr. joined the crew, O'Brien, Sr. testified that much of the hiring already had been performed by the "California coordinator." When asked which casual list the "California coordinator" had used, O'Brien, Sr. testified, "I believe he may have gotten one from the Local. I don't know." O'Brien, Sr. testified that as to drivers that he hired/referred on "Surrogates," he followed the same basic hiring/calling procedures he had utilized in "Ghosts of Girlfriends Past,"[28] but also testified that he hired some other drivers put out of work by the closure of their employer, a trucking company.

Immediately following "Surrogates," O'Brien, Sr. was appointed TC for "Knowing," a production which lasted about 3 or 4 days. O'Brien, Sr. hired/referred eight drivers to this production, all from the casual list.[29] Among the eight drivers, Paul Moran, Michael Indelicato, Charles Cronk,[30] and Keith Leahy had worked for O'Brien in the past on productions on which O'Brien, Sr. was a TC.[31]

In October 2008, O'Brien, Sr. was appointed TC for the television production, "Irish War," which lasted about 3 weeks. O'Brien, Sr. hired/referred about 18 drivers for this production, using both the seniority and casual lists. Neither O'Brien, Sr., nor the Union, kept any records of drivers called for, or referred to, "Irish War." O'Brien, Sr. testified that for this production he used the casual list dated July 29, 2008.

In February 2009, O'Brien, Sr. was appointed TC for the reality television production, "The Phone." Neither O'Brien, Sr. nor the Union kept records of which drivers O'Brien, Sr. hired/referred for this production.[32]

In March 2009, O'Brien, Sr. was appointed TC for the movie production, "The Lake House" a/k/a "Grown Ups" ("Grown Ups"), which was in production from around March 17, 2009, through about December 1, 2009. O'Brien, Sr. called and hired drivers from both the seniority list and the casual list dated December 23, 2008, and, at least on certain dates, as many as 91 drivers worked on the production. Neither O'Brien, Sr., nor the Union, kept a record of which drivers from the casual list O'Brien, Sr. actually called in his efforts to hire drivers for the production, such as copies of the casual list he actually used. O'Brien, Sr. testified that in using the casual list to hire for "Grown Ups," he called drivers that he knew from prior jobs and drivers whom other TCs recommended to him.

In October 2009, O'Brien, Sr. was appointed TC for the television pilot production, "The Social Network," which lasted about 2 weeks. O'Brien, Sr. initially hired about 10 drivers for this production, using the October 9, 2009, casual list to hire 5 of them. O'Brien, Sr. testified that the basis of his selection of the 5 drivers from the casual list was "'Cause they had probably worked for me on "The Lake House" ["Grown Ups"].

Subsequently, when more drivers were needed for "The Social Network," O'Brien, Sr. hired certain casual list drivers on the basis that they had worked for him on "Grown Ups." O'Brien, Sr. testified that he hired these drivers without even referring to the casual list because he knew they had "all the qualifications" and were "drug tested" because he had just worked with them on "Grown Ups," and because "The Social Network" and "Grown Ups" were produced by the same company.

Finally, O'Brien, Sr. testified that he did not contact Avallon to work on any of the productions for which he was the TC during 2008 or 2009. When asked by counsel for the General Counsel why he never called her to work on the productions, O'Brien, Sr. answered, "Cause I had some bad experiences in capability." O'Brien, Sr. further testified that she was not somebody he would allow to work on any of his movies.

As to his experiences with Avallon, O'Brien, Sr. testified that when he was TC for "Message in a Bottle,"[33] and Avallon was a van driver on the same movie, the movie's producer complained to him that Avallon was stalking actor Kevin Costner.[34] O'Brien, Sr. testified that he told the producer that he didn't believe "it," but then "I called the young lady aside and told her, and she naturally denied it to me." According to O'Brien Sr., he told Avallon, "You got to be careful and watch yourself."

Also, on the same movie, O'Brien, Sr. testified that Avallon "lied right to my face." O'Brien testified that while he was sitting in a restaurant, he saw Avallon "smash into a pole," in the parking lot, while driving a van. According to O'Brien, Sr., Avallon then parked the van in the back of the parking lot, came into the restaurant, and never mentioned the accident to O'Brien, Sr.

[28] Citing O'Brien, Sr.'s testimony, counsels for the General Counsel, in their brief, assert that "O'Brien Sr. admitted that when he hired the drivers for this movie he did not follow the procedure that he followed for the movie 'Ghosts of Girlfriends Past.'" In fact, the transcript quotes O'Brien, Sr., as testifying to the opposite.

[29] O'Brien, Sr. testified that all of his hires for "Knowing" were from the casual list. He also testified that he no longer had possession of the casual list he actually used, but believed it was the casual list dated July 29, 2008.

[30] Counsels for the General Counsel, in their brief, asserted that "Knowing" was the first production on which Charles Cronk worked with O'Brien, Sr. In fact, O'Brien, Sr. testified that he worked with Charles Cronk on the prior production, "Surrogates."

[31] Counsels for the General Counsel asserted, as a fact, in their brief that O'Brien, Sr. selected Moran, Leahy, and Indelicato from the casual list "because he had worked with them in the past." In fact, O'Brien, III testified that all three had worked for him in the past. He did not explicitly testify, however, that such was the reason he hired/referred them. Nevertheless, in other testimony referred to supra, O'Brien, Sr. testified that working with him in the past was one of his criteria for selecting drivers from the casual list to work on productions.

[32] O'Brien, Sr. testified that he couldn't recall if he kept records of whom he called or hired for "The Phone." Further, the Respondent produced no such records in response to the General Counsel's subpoena asking for same.

[33] O'Brien, Sr. testified he couldn't remember when this movie was made. Other witnesses testified that the movie was made in 1998.

[34] Testimony admitted only to show an asserted basis for O'Brien, Sr.'s refusal to refer Avallon, and not for the truth of the matter asserted.

O'Brien, Sr. testified that the next morning, Avallon told him that somebody had backed into the van overnight. When O'Brien, Sr. pointed out the glass from the accident in a different part of the parking lot, Avallon continued to deny her alleged role in the accident. O'Brien, Sr. testified that he did not require Avallon to complete an accident report, but instead fixed the van himself, and told Avallon to be careful with her driving. According to O'Brien, Sr., he helped Avallon and took no action against her because she was a union member, and he helped union members.

O'Brien, Sr. also testified as to other complaints he received about Avallon on "Message in a Bottle," including that "nobody wanted to ride with her," because she "drives too slowly, she had beads hanging from inside the front windshield, [and] she had an incense candle burning," while she was driving. He testified that the complaint as to driving too slow came from "the big star of the picture."[35]

Finally, O'Brien, Sr. testified that while he was co-captain on the production "What's the Worst that Could Happen," in 2002, and Avallon was a van driver on the movie, the wardrobe supervisor complained to him that the wardrobe employees were not going to drive with Avallon any more because she "put her hands over her eyes and ducked," while driving a van.[36] O'Brien, Sr. testified that upon the complaint he removed Avallon from driving the minivan, and put her into a regular-size van with the production company, and told Avallon that he wasn't "the judge here" because he didn't see the incident happen, but that "somebody's complaining." According to O'Brien, Sr., Avallon denied the wardrobe supervisor's allegation.

Robert Carnes

Robert Carnes is, and has been for 35 years, a member of the Union, is no. 14 on the seniority list, and has been appointed by the Union as the TC for various productions since 1995, including five productions in 2008. Carnes testified that, as a TC, when deciding which drivers to call to work on a production he first calls available drivers from the seniority, and then the casual list. When calling from the casual list, he gives first priority to drivers with an "A" CDL license, regardless of the type of vehicle to be driven on the production. Once the casual list is exhausted of "A" license drivers, Carnes looks to "B" CDL licensed drivers, regardless of the type of vehicles involved, and then to non-CDL casual list drivers.[37]

In respect to all of these groups, Carnes testified that he gives first priority to drivers he knows from working with them on previous productions, because he is familiar with their work. However, if his opinion of their past work is negative, he doesn't hire/refer them for a job. When asked by counsel for the General Counsel whether he would base his opinion on his own prior experience with the driver, Carnes answered, "Yes." Carnes testified that he keeps no records memorializing the names of drivers he calls from the casual list.

In February 2008, the Union appointed Carnes as TC for the movie production "The Proposal," which began in February and lasted until June. Carnes hired/referred about 25 drivers for this production, not including two drivers who came from California: Steven Dogherty, a DOT compliance officer, and Michael Ryan, the Los Angeles coordinator. Carnes testified that he first called drivers from the seniority list, and then the casual list, but that rather than exhausting the casual list, he only called drivers that he knew from prior jobs. He testified, "I know how they work and I call them by their ability and how they worked with me before." He selected these drivers from the casual list dated February 1, 2008. In addition to the casual list, Carnes also hired/referred drivers from Teamsters Local 251 in Providence, Rhode Island, whose names were supplied to him by the Union.

In June 2008, the Union appointed Carnes as TC for the movie production, "Four Single Fathers." The production's call sheet for July 16, 2008, lists 12 drivers working on the production, including Carnes and Captain Kevin Kelleher. In answer to questions posed by counsel for the General Counsel, Carnes testified in detail as to how he came to hire/refer John Fiddler for this production. Carnes testified that he used the June 25, 2008 casual list, and chose Fiddler, no. 243 on the casual list. Fiddler is the only non-CDL license holder listed on the call sheet,[38] and was assigned by Carnes to drive a 12-passenger van, which only required a non-CDL "C" or "D" license.

Carnes testified that he called Fiddler from the casual list because he mistakenly thought he was a friend of his brother, who had a class "A" CDL license, but that when he interviewed Fiddler he discovered it was a different person named Fiddler, and that this John Fiddler did not have a tractor-trailer license. Carnes testified that he decided to hire Fiddler anyway, because during the interview he discovered "how well he is around Boston and the area." "He sounded like a very intelligent gentleman so we—that's why I hired him."

About the beginning of August 2008, the Union appointed Carnes as TC on the production, "Donny McKay," which lasted about 3 weeks. Carnes hired 4 drivers to work on the movie, all from the casual list dated July 29, 2008, but Carnes did not keep a copy of the list he actually used to call the drivers.[39] Carnes hired/referred driver Dan Redmond because he worked with Carnes on the movie "21" and he liked the way Redmond performed his job. Carnes also hired driver Jeffrey Vance to work on "Donny McKay," and testified that he hired Vance because they worked together on "Four Single Fathers," and Carnes believed Vance had done a good job.

The Union appointed Carnes as the second unit TC on the movie production of "Edge of Darkness," which lasted about 3 weeks in the months of September and October 2008. As TC, Carnes hired/referred 18 drivers to this production, including 3 drivers from the seniority list. Among the drivers Carnes hired/referred from the casual list, he previously had worked

[35] See fn. 34.

[36] See fn. 34.

[37] Carnes estimated that about 90–95 percent of the driving positions on movies require CDL licenses.

[38] The production call sheet lists Fiddler as having a non-CDL "C" license. Carnes testified that Fiddler had a "B" license.

[39] Carnes testified, "We're very, very sparse with paperwork."

with Dana Price, who maintained a non-CDL "D" license, on "The Proposal."

Carnes also hired/referred casual list drivers Brian Hatch and Joe Fournier for "Edge of Darkness." Carnes testified that he hired Hatch because he worked with him on "The Proposal" and liked his work, and because Hatch maintained a CDL "B" license. Carnes testified that he hired Fournier because he had worked with him before on a production on which Fournier drove a fuel truck, and because Fournier maintained a HAZMAT endorsement on his driver's license.

The Union appointed Carnes as TC for the movie production "Hatteras." which took place in November and December 2008. A call sheet dated December 8, 2008, contains the names of 12 drivers, including Carnes, who worked on this movie. Carnes testified that he hired/referred for this production from the casual list Dana Price, who earlier worked with Carnes on "The Proposal" and "Edge of Darkness," and Joseph Travers and Jacob Hackett because they worked with Carnes on previous productions, and he liked their work. Carnes also testified that he called driver Ed King from the casual list to offer him a job, but King turned down the offer. Carnes said he called King because he had previously worked with him.

The Union appointed Carnes as TC on the movie production "Zookeeper," which began in June 2009 and ended on November 20, 2009. Carnes testified that he mostly chose drivers for this movie based on his prior experience working with them. He also testified that, "I called drivers that were available coming off other shows and after speaking with them, make a decision if I was going to use them on my show or not." A call sheet for the movie contained a list of about 40 drivers working at some point during the production.

As to Avallon, Carnes testified that he did not call her to any movies on which he was TC during 2008 or 2009 because of his opinion of her "as a former driver." Carnes said he worked on "In Dreams" with Avallon, that he observed Martini assign Avallon to go to New York, and that Avallon replied, "I'm not going to New York" and "stormed off," and that Avallon's stepfather, Flynn, thereupon relieved Martini of his duties.[40]

Carnes further testified that he worked with Avallon on the production "Message in a Bottle" in 1998, that he observed security guards escort Avallon off the production's base camp in the area of actor Kevin Costner's trailer, and that he was later told by Martini that the guards asked Avallon to stay away from the set.[41] Carnes said that on the same movie he served as the driver for actor Paul Newman, that on one occasion Newman became impatient as Carnes had slowed to a speed considerably below the speed limit because of a slow-moving van in front of him which was traveling at about 20 miles per hour, that Newman commented, "that shouldn't be happening," that as Carnes was passing the slow-moving van, he noticed that the driver was Avallon, and that when Carnes asked Avallon about the incident the next day she told Carnes that she was tired because it had been a long day, and that Carnes should "mind his own business."

Robert Wright

Wright is a member of the Union, has worked as a driver in the movie industry since about 1997, and is on the Union's seniority list. He was appointed by the Union as TC for 4 movies in the period 2007−2009. Wright testified, that as TC, when hiring/referring drivers from the casual list for a production, he first looks for drivers that possess a CDL "A" or "B" license, as 95−97 percent of the driver positions on movies required a CDL license.

Wright further testified that if he cannot fulfill the production's driver needs with CDL drivers, he considers non-CDL casual list drivers based on their "prior work ethic and practice," and that he measures work ethic by "working with them before or maybe worked for me on a prior production." He testified that he wouldn't "take a chance" on drivers he hadn't worked with, and if a sufficient number of drivers that he had previously worked with were not available, he would seek driver recommendations from other TCs. He also testified that he would take into consideration prior problems a driver experienced while working on a production, "if they're documented." Wright kept no list of drivers that he called who were not available, made no notations on the casual list he used as to drivers whom he called, kept records as to drivers who worked on productions for about a year and a half, sends certain records to the Union to make sure drivers are "up to date on their dues," and does not send weekly records to the Union as to ongoing jobs.

As to Avallon, Wright testified that when selecting drivers to work on movies, he saw Avallon's name on the casual list, but did not choose her to work on a movie. He said that he didn't choose her because of his prior experience working with her, and what he heard from other crew members about Avallon. Wright testified as to a number of incidents and conversations about incidents involving Avallon, but also testified that none of these incidents were "documented," and that he never directly discussed with Avallon his asserted concerns over her performance.

Wright testified that during 2002 he and Avallon worked as drivers on the movie "What's the Worst that can Happen," and that an incident occurred involving Avallon's performance as a driver for the movie's wardrobe manager, James Kurland. According to Wright, Avallon drove Kurland to a Boston department store to fetch clothing for an actor who was unhappy with his costume, but Kurland was unable to locate Avallon after making the purchase, and had to hail a taxi to travel back to the movie set, resulting in wasted time during the production. As a result of the incident, Flynn reassigned Wright to drive Kurland, and Avallon was assigned to drive Wright's van. Wright testified that following the incident, he asked Avallon what happened, and Avallon told him that she had parked on one side of the store and Kurland was waiting at the other side, and that Avallon was afraid that if she left her vehicle to find Kurland, she would get a parking ticket.[42]

[40] Carnes testified that he didn't actually observe Flynn relieve Martini of his duties, but that Martini told Carnes that Flynn took away his radio because Martini assigned Avallon to drive to New York.

[41] Testimony admitted only to show an asserted basis for Carnes' refusal to refer Avallon, and not for the truth of the matter asserted.

[42] Wright's testimony as to the incidents occurring during "What's the Worst that can Happen" is based on what was told him by Kurland. The Respondent stipulated that it was not in for the truth of the matter

Wright also testified that during "What's the Worst that can Happen" Kurland told him that as he was being driven by Avallon, and as they were proceeding to pass through a tunnel, Avallon ducked her head down, causing Kurland to have to grab the wheel, in fear that there would be an accident. Wright testified that on another occasion during the production Kurland told him that when he asked Avallon to take him to Macy's or Filene's, Avallon would respond by asking him, "How do I get there?" Wright also testified that he noticed Avallon walking around the set and leaving her van unattended, resulting in passengers having to wait for her return or another van. Finally, Wright testified that while working with Avallon on the movie "Spartan" he observed that when the vans lined up to transport crew members the crew would choose vans other than Avallon's. According to Wright, the crew members "said they were a little nervous driving with her for a few reasons."[43]

Analysis and Conclusions

Allegations as to Union's Operation of its Hiring Hall

The complaint alleges the Union violated Section 8(b)1)(A) of the Act by making referrals of employees to employers via its hiring hall without regard to its published rules, and without maintaining or making available to employees records regarding the operation of its referral system. The complaint then specifies these allegations as follows: that the Union failed to "consistently inform its members of unwritten criteria used by it for referral," that the Union failed to refer individuals from the casual referral lists who are unknown to its transportation coordinators"; that the Union "failed to maintain records of the operation of its referral system"; and that the Union "failed to uniformly limit the work of casual drivers known to, and liked by, its transportation coordinators."

Regardless of the complaint pleadings, the proofs and the arguments of both parties in brief, and at trial, were essentially devoted to two issues: Whether the Union's operation of its hiring hall violated the Act by, assertedly, failing to apply objective criteria in making referrals from the casual list, and failing to follow its written rules; and whether the Union violated the Act by failing and refusing to refer Denise Avallon to a driver's job.[44]

Counsels for the General Counsel argue in their brief, as to the Union's operation of the hiring hall, that the Union failed to follow its own written referral rules, and made referrals based on subjective criteria. As to the Union's written rules, counsels for the General Counsel point out that nothing therein addresses the issue of substandard job performance as a basis for nonreferral. As to subjective criteria, counsels for the General Counsel maintain that the Union allowed the TCs "unfettered discretion" in making referrals based upon "their personal opinions of the TCs, who they knew, who they previously worked with and were comfortable with, who other people recommended, and who may have been in need of work."

Contrariwise, the Union argues that the TCs, in fact, applied objective criteria in selecting members for referral from the casual list. Further, citing *Morrison-Knudsen Co*., 291 NLRB 250 (1988), the Union maintains that the TCs' use of drivers' qualifications, experience, and availability as a basis for choosing candidates, even where the written rules are silent as to such or as to an objective basis to judge such, is permissible, and does not violate the Act. The Union further argues that where, as here, the casual list drivers have not been otherwise vetted, the Union would "undermine its own interests and ability to represent the drivers in the movie industry if it was required to uncritically refer individuals from the casual list." In respect to Avallon, the Union, citing *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292 (1984), maintains that "the totality of evidence shows that Ms. Avallon was not a qualified or competent driver," and that she did not possess a CDL license.

The Supreme Court has upheld the legality of hiring hall referral systems, acknowledging that "the very existence of a hiring hall encourages union membership," but holding that "the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination."[45] *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 674–676 (1961) (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954)). But, since a union has such comprehensive authority vested in it when it acts as the exclusive agent of users of a hiring hall and because the users must place such dependence on the union, there necessarily arises a fiduciary duty on the part of the union not to conduct itself in an arbitrary, invidious, or discriminatory manner when representing those who seek to be referred out for employment by it. *Iron Workers Local 111 (Steel Builders)*, 274 NLRB 742, 746 (1985). No specific intent to discriminate need be shown to support a finding of an unfair labor practice in the improper operation of a hiring hall. *Carpenters Local 25 v. NLRB*, 769 F.2d 574, 580 (9th Cir. 1985).

Such fiduciary duty requires a union to employ objective standards for the referral of employees. Operating an exclusive hiring hall without reference to such is violative of Section 8(b)(1)(A) of the Act. *Laborers Local 394 (Building Contractors Assn. of New Jersey)*, 247 NLRB 97 fn. 2 (1980). Allowing union officials, such as business agents, unfettered discretion in making referrals is a failure of the Union's fiduciary responsibility, and a violation of the Act. *Plumbers Local 619,*

asserted, but only to establish a basis for Wright's decision not to hire/refer Avallon. The testimony has not been considered for the truth of the matter asserted.

[43] Testimony not admitted for the truth of the matter asserted, but to show an asserted basis for Wright's refusal to refer Avallon.

[44] For example, this is exactly how the arguments were framed in counsels for the General Counsel's brief. Said brief allocates a single paragraph to arguing that while the Union's asserted failure to keep records would not constitute a per se violation, the record evidence as to instances of the TC's failure to maintain written records of their selection and referral methods "lends considerable support to counsels for the General Counsel's argument that the Respondent has been, and continues to, violate the Act in the operation of its referral system." Neither the brief, nor counsels for the General Counsel's arguments at trial, articulates the basis of the complaint allegations as to failing to consistently inform its members of unwritten criteria used by the Union for referral, or failing to uniformly limit the work of casual drivers known to, and liked by, its transportation coordinators.

[45] *Stagehands Referral Service*, 347 NLRB 1167 (2006).

(Bechtel Corp.) 268 NLRB 766 (1984). But the mere facts that the referrals lacked written documentation or that a union business agent utilized his own judgment in determining the skills and experience of job applicants as a factor in job referral are not sufficient, in themselves, to prove an abuse of fiduciary responsibility, although they may lend themselves to abuse. *Morrison-Knudsen Co.*, supra.

Here, the Union operates an exclusive hiring hall,[46] and has vested authority to Union-appointed TCs to choose drivers for hire/referral. While the Union maintains written rules controlling job referral, I find, based on the testimony of the TCs, that they make decisions as to the hire/referral of drivers in the following manner. First, they utilize the seniority list, going down the list in order of seniority. After the seniority list is exhausted, the TCs choose drivers from the casual list, giving first consideration to driver availability and drivers with "A" or "B" CDL licenses. When choosing drivers from the casual list, the TCs take into consideration the "work ethic" or work performance of the drivers, but only as measured by how the drivers performed, in the TCs' estimation, based on the TCs actual experience in working with the drivers on previous jobs.[47] If the TC has never previously worked with a casual list driver, then the TC does not, generally, consider the driver for referral. In the absence of available casual list drivers whom the TC had worked with previously, the TC seeks recommendations from other TCs who worked with drivers who may be available.[48]

While the bulk of the TCs' testimony indicates that their choices for drivers are generally made from the lists, some of the TCs testified to occasions when nonlisted drivers were hired/referred for a production. Thus, O'Brien, Sr. has hired some drivers who were out of work, and hired a driver from the union hall. Carnes has hired drivers whose names were supplied by the Union. Wright called Harrington for the names of out of work "oilmen." Kelleher hired/referred "day players." O'Brien III, called retired drivers and drivers from other unions when the casual list was exhausted, but didn't call Avallon, who was on the list. O'Brien, on one occasion, called O'Brien, Sr. as to a union member who had been discharged during an organizing drive, and the driver was hired. On another occasion, O'Brien called a TC, and obtained a movie job for an out-of-work union member with a severe medical condition, who lacked health insurance. Kelleher hired "day-players," not on the Union's lists.

Applying the law to these facts, I conclude that the Union has, in fact, allowed the TCs unfettered discretion in making hiring decisions and, thus, violated Section 8(b)(1)(A) of the Act. While the TCs generally take into account a driver's past work performance, nothing in the Union's rules, written or otherwise, requires such. Further, even when the TCs take such into account, their judgment is based, almost exclusively, on the TC's personal, anecdotal, experiences in the past in working with the driver. There is no evidence that any of the TCs utilize Union or any other records, other than a driver's self-submitted resume, to check a driver's experience, background, or work performance. Such unfettered discretion lends itself to various abuses, including TCs using friendship, personal or other enmities,[49] familial relationships, or other arbitrary bases in reaching hiring decisions. This is especially true where, as here, the Union's recordkeeping as to its referral process is, at best, minimal, and contrary to its own rules.

In reaching said conclusion, I have taken into account the Board's holding in *Morrison-Knudsen Co.*, supra, and the Respondent's argument, in brief, to the effect that a business agent's use of subjective judgment in determining an applicant's skills and experience does not, in itself, prove a failure of the Union in respect to its fiduciary obligations. *Morrison-Knudsen* is, however, inapposite on its facts. There, the Board relied on the following passage in the Judge William N. Cates' decision in reaching its conclusion that the union's agent sought in good faith to determine the qualifications of applicants: "Although the Union had no written rules or objective criteria concerning experience and qualifications of the individuals utilizing the referral hall, I find that the operation was not left to the unbridled discretion of Holloway or any other union official. The determination . . . was objectively considered in that a record was made of the individual's qualifications as stated by the individual . . . in conjunction with . . . [Holloway's] own assessment . . . based on questions he had asked the individual, and . . . the referral records, which indicated whether an individual had worked . . . on the waterway in the past." *Morrison-Knudsen Co.*, supra at fn. 6.

In the instant case, there is no evidence that the TCs attempted to check the Union's referral records as to an applicant's past experience working on movie productions or that the Union even kept such records. Instead, the evidence demonstrated that the TCs relied on their own personal experience in previously working with applicants or sometimes anecdotal evidence from other TCs. If a casual list applicant had not previously worked with a particular TC, he/she likely wasn't considered. See *Stage Employees IATSE Local 7 (Carole A. Miron)*, 339 NLRB 214, 219 (2003), where the Board found a union agent to have exercised unfettered discretion, in violation of the Act, where he made subjective determinations as to experience, skills, and ability, based on "observation or word of mouth from others."

Further, as found, in some circumstances a TC utilized criteria other than work skills and experience in selecting applicants for hire/referral, including conversations with higher union

[46] The complaint so pleads and the answer so admits. Respondent's counsel explicitly so stated on the record.

[47] While the TCs testified, generally, that they, generally, only chose or gave preference to drivers whom they knew from working together on past jobs, there was no evidence that such choices were based on friendship or familial relationships.

[48] Findings based on the cumulative credited testimony of the TCs who testified, as is set forth supra. Much of these findings were testified to by all the TCs. Some of the TCs testified to all of these findings. None of the TC's testified to the effect that any of these findings were inaccurate.

[49] For example, while counsels for the General Counsel at trial waived any theory as to the Union specifically retaliating against Avallon because of hostility to her stepfather's past holding of Union office and administration of the Union, and no evidence was introduced of such, the TC's unfettered discretion in hiring would make such an occurrence possible. Of course, in the absence of evidence to support such occurrence here, I make no findings.

officials as to members who needed work because of personal situations.[50] Under all of these circumstances, I conclude that the Union violated Section 8(b)(1)(A) in the operation of its exclusive hiring hall by allowing its TCs unfettered discretion in hiring/referral decisions, by failing to maintain adequate records of its referral process,[51] and by utilizing criteria for hiring other than those set forth in and, hence, departing from its written rules.[52]

Avallon

The Union argues, as to Avallon, that she was not referred because of her past performance problems, and that if it referred Avallon it would be risking its relationships with employers it has contracted with, by referring a poorly performing employee. Counsels for the General Counsel, argue in their brief, that there have never been any formal allegations made against Avallon which she could defend against, that the reports of her alleged work-related problems are mostly hearsay with some TCs simply relying on stories they were told by others or, essentially, gossip, that the alleged problems occurred years ago, and that the Union maintained no records of any problems associated with Avallon.

There is a rebuttable presumption that arises when a union interferes with an employee's employment status for reasons other than the failure to pay dues, initiation fees, or other fees uniformly required, that the interference is intended to encourage union membership. *Operating Engineers Local 18*, 204 NLRB 681 (1973). A union bears the burden of establishing that referrals are made pursuant to a valid hiring-hall provision, or that its conduct was necessary for effective performance of its representational function. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1170 (2006). The law does not require a showing of specific intent to discriminate to support a finding of an unfair labor practice. *Carpenters Local 25 v. NLRB*, supra.

Inasmuch as I have found that the Union's operation of its hiring hall violated the Act, said operation applied to all employees utilizing its services, including Avallon. *Stage Employees IATSE Local 7 (Carole A. Miron)*, supra. Accordingly, the failure to refer Avallon violated Section 8(b)(1)(A) and (2) of the Act.[53] In this regard, the Union's implied and stated arguments that there were insufficient jobs available to which Avallon could be referred is unpersuasive. I found that drivers without CDL licenses were referred to jobs, and that some drivers who were referred did not even appear on the Union's lists. Further, all but one of the TCs who testified, said that they would not refer Avallon.

Beyond my finding that the Union's illegal operation of its hiring hall affected Avallon, I also find that the Union violated Section 8(b)(1)(A) and (2) specifically by its failure and refusal to refer Avallon. I begin here by agreeing with the Union's argument that actions taken by it to protect its representational status, "may overcome the inference that its refusal to refer an individual was to encourage union membership by showing that the union refused to refer the applicant based upon a history of misconduct."[54] The Respondent's counsels' brief accurately cites *Stage Employees IATSE Local 150 (Mann Theatres)*, supra, for the proposition that a union's referrals of an employee, under the circumstances therein, "would jeopardize its position as the exclusive representative."

But the Board, in said case, principally relied on a factor not present herein. In *Stage Employees IATSE Local 150 (Mann Theatres)*, the Board found, and relied on, the fact that employers who were party to the hiring hall, explicitly informed the union that they did not want the employee referred to work for them for performance reasons. The Board concluded, that to do otherwise would jeopardize the union's relationship with those and other employers. Indeed, in differentiating a later decision, *Stagehands Referral Service*, supra at 1171, the Board referred to its decisions in *Stage Employees IATSE Local 150 (Mann Theatres)*, supra, and *Plasterers Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386 (1981), as cases where the "unions' decisions not to refer were objectively based on employer complaints."

Here, the record is devoid of employer written or other formal complaints about Avallon. There is no evidence that any employer requested that Avallon not be referred to, or removed from, a production. There is testimony from some of the TCs that were witness to some asserted incidents of Avallon's or had heard stories of her alleged misconduct, but there is no evidence that in any of those alleged incidents an employer excluded Avallon from work, requested the Union not to refer her, or formally, in writing or otherwise, complained to the Union.

The record is, thus, devoid of evidence that any contracting employer ever filed any written complaint with the Union as to

[50] While the record indicates that some of these referrals were made for reasons that could be broadly characterized as humanitarian, they are, nonetheless, a subjective basis for referral and without support in the Union's own referral rules. "Where . . . there is no evidence that objective criteria have been utilized, the Board has found that a union's reliance on an applicant's financial need is a factor which supports a finding that a hiring hall has been unlawfully operated." *Plumbers Local 619 (Bechtel Power Corp.)*, 268 NLRB 766 (1984). There, the Board found the Union's usage of the following criteria for referral to be subjective, and evidence of illegal operation of a hiring hall: "if he needs something bad enough and his family needs feeding and everything."

[51] Failure to adequately maintain written records of the referral process is not a per se violation, but where combined with allowing union agents unfettered discretion in hiring, may be a violation *Laborers Local 394 (Building Contractors Assn. of New Jersey)*, 247 NLRB 97 fn. 2.

[52] Here, the Union maintains written rules for referrals, but said rules do not mention criteria used by the TCs including a de facto rule that, essentially, gives priority to drivers who have worked with a TC in the past.

[53] There is no dispute that Avallon has not been referred by the Union since March 8, 2008. All of the TCs, except Kelleher, admitted that they had not called Avallon during this period. Kelleher testified that he had no specific recollection of calling Avallon, but believed he called her because he went down the list name by name. Because of the uncertainty of his testimony, and in view of the testimony of the other TCs, I make no finding as to whether or not Kelleher actually called Avallon. By this, I do not conclude that Keller was not a credible witness, but that he was uncertain as to the specific testimony in respect to Avallon.

[54] From the Respondent's counsels' brief.

Avallon. The Union never put Avallon on notice of any complaints against her, or informed her that the asserted reason for its failure/refusal to refer her was related to alleged problems with her job performance. As stated by Judge Lawrence W. Cullen under partially analogous circumstances, in a decision adopted by the Board, *Stage Employees IATSE Local 412 (Asolo Center)*, 308 NLRB 1084, 1088 (1992), "If the Union had legitimate problems with . . . past conduct on the job . . . it had available to it, its own internal procedures for bringing charges. . . . However it did not do so, but rather treated him as having been charged and found guilty by imposing economic sanctions by refusing to refer him for employment."

Here, with no notice to Avallon, this is exactly what the Union did. On the one hand, the Union claims its TCs refused to refer Avallon because of her job performance. On the other hand, nobody from the Union ever notified Avallon that there was a problem with her work, or even bothered to inform her that she was not being referred for that reason.[55] The Union, thus, never gave her an opportunity to contest or respond to the allegations.

More specifically as to the asserted complaints about Avallon, I have no doubt that the TCs testified to the best of their recollections as to incidents they observed or as to what they were told by others. Avallon was also a credible witness, displaying composure on the witness stand, answering pointed questions on cross-examination without evasion, and generally demonstrating the demeanor of a credible, forthright witness. Because all of these events took place a number of years ago and seemed like relatively minor events at the time, the recollections of all the witnesses are not as strong as they would be as to more recent events.[56]

I, thus, conclude that it's well-neigh impossible to accurately reconstruct the events based on the testimony herein.[57] I can conclude, however, that based on the testimonial demeanor of the TCs, they honestly believed the events occurred as they testified to. Nevertheless, no employer ever filed a written complaint against Avallon, or asked that she be dismissed from a job, or not referred to a job. Further, the Union never informed Avallon as to why she wasn't being referred or as to the allegations against her, or sought her side of the story.

Indeed, much of the TC's testimony as to work-related contretemps involving Avallon, was hearsay, and explicitly admitted as an asserted basis for not referring Avallon, but not for the truth of the matter asserted. Even had I fully credited the TCs who testified as to events involving Avallon that they actually observed, such would not have changed the outcome herein because on none of these occasions did an employer formally or in writing complain to the Union or Avallon, remove Avallon from a job, or request that the Union no longer refer Avallon, nor did the Union inform Avallon as to, or keep records of the, asserted problems.

Under these circumstances, I conclude that the Union has not successfully demonstrated that referring Avallon would have jeopardized its relationships with contracting employers, because there simply is insufficient evidence to bear this out.[58] Accordingly, I find that the Union violated Section 8(b)(1)(A) and 2 of the Act by its refusal and failure to refer Avallon to a job as alleged in the complaint.

Other Allegations

The complaint alleges as a violation of Section 8(b)(1)(A and (2) that the Union failed to uniformly limit the work of casual drivers known to, and liked by, its transportation coordinators. While counsels for the General Counsel's brief argues that the Union's hiring hall operation violated the Act in that it utilized subjective criteria in choosing drivers for referral, it makes no mention of this specific allegation nor any argument as to how the Act was so violated. Inasmuch as I have already concluded that the Union violated the Act in the operation of its hiring hall and will recommend an appropriate remedy therefor, and as the

[55] Harrington testified that at the time he placed Avallon's name on the casual list he had spoken to various TCs, including some who did not testify herein. According to Harrington, he was told by the TCs that they were not referring Avallon because they thought "she was a bad employee." Further, according to Harrington, the TCs specific complaints about Avallon were "not being around her van when she was supposed to be, not going to New York when she was asked to go, smoking in her van, stalking Kevin Costner." The Union was, thus, well aware of the asserted reasons why Avallon was not being referred. Harrington was asked by counsel for the General Counsel as follows: "With respect to those specific allegations, did you call up Ms. Avallon and say to her we have a problem with your work performance 1997-2003?" Harrington answered, "No."

[56] From my close observation, all of the TCs who testified displayed the demeanor of witnesses striving to accurately and honestly recollect incidents which occurred many years ago. While some of the TCs grew testy while on the stand, in my judgment this simply reflected frustration from testifying over long periods of time, and from trying to recall events, most of which occurred many years ago. Nevertheless, I note that a portion of their testimony was not based on personal observation, but reflected accounts relayed to them by third parties who were asserted witnesses to the events. Avallon was also a generally credible witness, and this was displayed by her calm reaction to pointed questions asked on cross-examination, and her largely consistent answers given during a considerable amount of time spent on the witness stand. While she denied or otherwise explained much of the occurrences testified to by the TCs, I have no doubt that the TCs believed the events occurred. I observe that all of these incidents occurred some years ago, and that memories become hazy over such a period of time. Part of the problem here is caused because none of these events were ever recorded in the Union's records, or in writing by any of the employers involved, or their employees.

[57] In her testimony, Avallon said she simply retrieved the wayward ball that Kevin Costner and his son were playing with and never stalked Costner, explained that she understood the New York assignment to be a joke being played on her, which caused her stepfather, Flynn, to become angry and, thus, the incident arose as a result of a misunderstanding, and denied the van parking lot accident or that she ducked her head while driving passengers in a van. As noted, she was not removed from any of the involved productions.

[58] I further note in this regard that the Union did refer driver James Dolan, whom Harrington had known for over 30 years, to the movie "Ashcliffe," which lasted "a couple of months," to the movie "Surrogates," which lasted "about a month," and to the television production "Extreme Makeover." These referrals occurred despite the fact that Dolan "couldn't find his way across the street," according to Harrington. Harrington also testified that the Union stopped using Dolan, but then testified that he "didn't think he's worked since ["Surrogates"]. The latter testimony indicates that Harrington isn't certain whether, in fact, the Union has stopped calling Dolan.

General Counsel does not appear to be pursuing this allegation either in proofs or argument, I shall dismiss this allegation. In doing so, I note that the proclivity of TCs to give priority to drivers they had previously worked with, sometimes to the point of not even considering other drivers on the casual list, was considered as one of the bases of concluding that the Union violated the Act.

The complaint also alleges as a violation of Section 8(b)(1)(A) and (2) that the Union failed to refer individuals from the casual lists who were unknown to the TCs. Again, here, the brief of counsels for the General Counsel does not directly address this allegation, but argues that the Union's hiring hall referrals were based on subjective criteria as follows: "the evidence establishes that the Respondent, through the TCs, used unfettered discretion in making referrals based upon the personal opinions of the TCs, who they knew, who they previously worked with and were comfortable with, who other people recommended, and who may have been in need of work."

Nevertheless, the facts, as found, support this complaint allegation. Each of the TCs testified to utilizing said criteria, sometimes to the exclusion of other considerations and sometimes to the extent that they wouldn't consider referring drivers they hadn't worked with before. The Union argues, in its counsels' brief, that since experience is an objective factor, using such as a criteria for referral does not violate the Act.

While I agree with the Union's argument that experience is an objective factor, the testimony of the TCs demonstrates that rather than simply considering experience, the TCs looked to whether they had previously worked with a listed driver, and gave preference in calling drivers to those they had worked with and whose work they liked. There was no testimony that they utilized the Union's or other records in ascertaining a driver's experience and deciding which drivers to initially call. Based on the testimony of the TCs, it would appear that even the most inexperienced casual list driver would be considered before a more experienced driver, if the less experienced driver had previously worked with the selecting TC. Thus, to the extent that experience is an objective factor, weighing that experience only as it pertains to the particular TC selecting drivers, is not. Accordingly, I conclude here, that the Union violated Section 8(b)(1)(A) and (2) of the Act, as alleged.

The complaint further alleges that the Union failed and refused to refer Avallon for the further reason that she "was known to, and disliked by, the transportation coordinators who had worked with her in the past." The clear sense of this allegation is that the TCs were motivated in their decisions not to call Avallon for referral by their personal dislike of her. While there is evidence that many of the TCs who testified knew and had worked with Avallon, and most of the TCs testified to and complained of work performance incidents involving Avallon, there is no evidence in this record to support a finding that Avallon was personally disliked by any of the coordinators. Accordingly, I shall dismiss this allegation.

Finally the complaint alleges that the Union violated Section 8(b)(1)(A) and (2) by failing to "consistently inform its members of unwritten criteria used by it for referrals to jobs in the television, motion picture, and commercial industry." Here, counsels for the General Counsel make no mention of this allegation in any arguments set forth in their brief or in said brief's remedy section, nor is said allegation mentioned in the conclusion section of the brief where they summarize the various ways in which they assert the Act was violated.

Apparently, this allegation refers to the Respondent's admitted failure to inform Avallon as to the asserted performance based reasons for which she was not being referred and/or the failure of the Union to inform hiring hall users of the TCs' usage of working with drivers in the past as a criterion for referring drivers to jobs. Inasmuch as the General Counsel does not appear to be pursuing this allegation, and as I am recommending remedies both as to the operation of the hiring hall and the nonreferral of Avallon, I shall dismiss this allegation.

CONCLUSIONS OF LAW

1. The Parties to Contract are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has been at all material times hereto a labor organization within the meaning of Section 2(2), (6), and (7) of the Act.

3. By the following actions, on about the dates set forth below, the Respondent, in the operation of its exclusive hiring hall, has caused the respective employers, Parties to Contract, to encourage their employees to join or assist the Union, has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act, and has been attempting to cause and causing employers to discriminate against their employees in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act:

(a) Since January 1, 2008, making referrals of employees without regard to published rules, dated December 17, 2007, governing that process, and without maintaining records regarding the operation of its referral system.

(b) Since January 1, 2008, making referrals of employees without using objective criteria, and by using subjective criteria to favor certain users of its exclusive hiring hall.

(c) Since March 8, 2008, failing and refusing to refer the Charging Party, Denise Avallon, an employee within the meaning of Section 2(3) of the Act, to employment with the Parties to Contract, for reasons other than the failure to tender the periodic dues and the initiation fees uniformly required for membership in the Respondent.

4. The unfair labor practices found above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not violate the Act in any manner other than that specifically found herein.

THE REMEDY

Counsels for the General Counsel, in their brief, argue that the following remedy would be appropriate herein. A cease-and-desist order requiring the Respondent to cease: refusing to refer Avallon for arbitrary and invidious reasons; departing from its written rules governing the referral of drivers; applying subjective criteria as the basis for referrals; and failing to refer members or nonmembers to work for arbitrary and invidious reasons. Additionally, the General Counsel seeks an affirma-

tive order requiring the Respondent to make the Charging Party, Denise Avallon whole, with interest compounded on a quarterly basis for the Respondent's refusal to refer her to employment after March 8, 2008, and to post an appropriate notice. While, counsels for the General Counsel, argue that the Respondent should be ordered to make the Charging Party whole, they do not argue that a make-whole remedy should be extended to anybody else.

The Respondent, in its counsels' brief, argues that even if the Respondent is found to have violated the Act vis-à-vis Avallon, as alleged in the complaint, no make-whole or backpay remedy should be ordered. In this respect, the Respondent argues that its current written referral rules, in effect since 2007, require a driver to possess a CDL (commercial driver's license) to be included on the casual list, and that Avallon, admittedly, did not possess such a license. In this respect, the Respondent concedes that it allowed Avallon, and others, placement on the casual list, even without a CDL, but that these exceptions were informal in nature, and not codified by the Union's rules. Thus, the Respondent argues, any backpay order to Avallon would force the Union to violate its own referral rules.

In the circumstances herein, make-whole orders have been repeatedly imposed as the appropriate remedy by the Board. Indeed, as stated by the Board in *Stage Employees IATSE Local 720 (AVW Audio Visual, Inc.*), 352 NLRB 29, 32 (2008), "Almost without exception, the remedy ordered by the Board for unlawful refusals to refer employees from exclusive hiring halls has been, and is, that "the union shall make [the employee] whole for any loss of earnings and benefits sustained by him as a result of the union's failure and refusal to refer him for employment." (Citation omitted.) The purpose of a make whole remedy is, to the extent possible, to put the victim of the unfair labor practice in the same position he/she would have been in if the unfair labor practice had never have occurred. *Contractor Services, Inc.*, 351 NLRB 33, 35 (2007).

Here, the Union was allowing drivers without CDL licenses placement on the casual lists. Further, as found, even drivers not included on any of the Union's lists were referred by TCs to jobs. By its failure to refer Avallon, in violation of the law, the Union deprived Avallon of income and benefits she would have earned but for the Union's transgressions. As set forth above, in such situations, almost without exception, the Board imposes its traditional make whole remedy.

Said remedy does not require that the Union violate its rules, but simply takes into account the Union's violation of the Act, and the real world impact such had on the Charging Party. Simply put, if the Union had not violated the Act as found herein, Avallon would have been referred to jobs, and would have earned wages and benefits. I, thus, find the Union's argument here, to the effect that since it was violating its own rules at the time of the unfair labor practices, such violation insulates the Union from an otherwise appropriate make-whole remedy, to be unpersuasive.

Under these circumstances, I find that the Board's traditional make-whole remedy in such cases is appropriate. I, thus, recommend that the Union shall make Denise Avallon whole for any loss of earnings and benefits sustained by her as a result of the Union's failure and refusal to refer her for employment. See *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Backpay and benefits shall be with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Inasmuch as there is no evidence that any individual, other than Avallon, was affected by the Union's violations, as no other individual was named in the complaint, and as the counsels for the General Counsel mentioned no other individuals at trial or in brief, and do not argue in brief or otherwise that a make-whole remedy should extend beyond Avallon,[59] I shall limit said remedy to the Charging Party.

I further conclude that the balance of the remedy sought by the General Counsel, with one exception, is the traditional Board-imposed remedy for violations such as those found herein, and will so order. However, as to the General Counsel's argument seeking interest compounded on a quarterly basis as part of the remedy, I decline to so order. In several recent cases, the Board has declined to change its current method of calculating interest, and I am bound by Board precedent. See *Transportation Solutions, Inc.*, 355 NLRB 136 fn. 6 (2010).

[Recommended Order omitted from publication.]

[59] Indeed, in the remedy section of their brief, counsels for the General Counsel, in arguing for a make whole remedy for Avallon, do not argue for a make-whole remedy beyond Avallon.